UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID S. AYERS,)
WARREN DISTRIBUTING, INC.,)
AYERS AIRPORT PARK FLETCHER)
MARATHON, INC.,)
ROBERT J. AYERS,)
BOB'S LYNHURST MARATHON, INC.,)
JACK J. COAPSTICK,)
J & M MARATHON, INC.,)
ROBERT A. SPENNER,)
BOB'S 38TH STREET MARATHON,)
INC.,)
TIM D. CANODE,)
T&T OIL, INC.,)
ROBERT L. DAWSON,)
PAMELA L. DAWSON,)
DAWSON & DAWSON MANAGEMENT,)
INC.,)
DENNIS ELLIS,)
WOODLAND SPRINGS MARATHON, INC.,)
KENNETH SURBER,)
BROAD RIPPLE MARATHON, INC.,)
PATRICK E. SHALLENBERGER,)
KRISTEN L. SHALLENBERGER,)
PATRICKS COLLEGE PARK MARATHON,)
RALPH COMPTON,)
COMPTON, INC.,)
SOHAIL A. SHAKIR,)
HAMAZA, INC.,)
RUBINA, INC.,)
OMAIR, INC.,)
FRANK STURGIS,)
FRANK STURGIS, INC.,)
VINCENT LAPENTA,)
LAPENTAS MARATHON SERVICE,)
GARRY PRICE,)

GARRY'S MARATHON INC,)
BRUCE BRUMMETT,)
BRUCE'S MARATHON SERVICE,)
WINSLOW ROAD MARATHON,)
NORMAN J. MCGATH,)
MCGATH'S MARATHON INC . EAST,)

RICHARD L. CHITWOOD, NEWT'S MARATHON, LARRY WATERMAN, LARRY'S MARATHON, GARY BAYLES, BAYLES AUTOMOTIVE SERVICE INC, JON E. GRAHAM, MARATHON AUTO CARE, INC, RANDALL J. CHILDERS, CHILDERS MARKETING, INC, Plaintiffs, vs. MARATHON ASHLAND PETROLEUM LLC, Defendant.	)	NO. 1:03-cv-01780-RLY-TAB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID S. AYERS, et al., Plaintiff,	)	
vs.	)	1:03-cv-1780-RLY-TAB
MARATHON PETROLEUM COMPANY, LLC, Defendant.	)	

ENTRY ON MARATHON'S MOTION TO RECONSIDER ADMISSIBILITY OF DR. OLSEN'S OPINION

This matter is before the court on Defendant's, Marathon Petroleum Company, LLC ("Marathon"), motion to reconsider the admissibility of Dr. Olsen's opinion. For the reasons set forth below, Marathon's motion is **DENIED**.

I. Background

Dr. Olsen is Plaintiffs' economic expert who opines, in part, that Plaintiffs are similarly situated to one another because they are competitors and because Marathon charged them different DTW prices, Marathon discriminated unfairly among them. To determine whether Plaintiffs were competitors, Dr. Olsen used "trade areas," geographic regions from which a Marathon dealer, like Plaintiffs, draws the majority of its customers. If two dealer stations had overlapping trade areas, then Dr. Olsen concluded they were competitors. These opinions were included in Dr. Olsen's expert report dated January 18, 2007.

On July 2, 2007, Marathon filed a motion to exclude the expert testimony of Dr. Olsen, arguing that it did not pass muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). On December 11–12, 2007, the court held a *Daubert* hearing on the same.

During the *Daubert* hearing, Dr. Olsen discussed the opinions in his expert report. In discussing his opinion that Plaintiffs are competitors due to their overlapping trade areas, Dr. Olsen also discussed a "web" or "chain" of overlapping trade areas that connects the Plaintiff dealer locations. This chain of overlapping trade areas may be summarized as follows: if Station A competes with Station B, and Station B competes with Station C, then Station A competes with Station C. Considering Dr. Olsen's testimony at the *Daubert* hearing and the parties' briefs on the motion, the court denied Marathon's motion to exclude Dr. Olsen's testimony on March 27, 2008.

On May 22, 2008, Marathon filed the present motion to reconsider that ruling to the extent that it permitted Dr. Olsen to opine about the "web" or "chain" of overlapping trade areas. Marathon did not object to this opinion at the *Daubert* hearing. The court addresses the merits of that motion below.

II. Standard for a Motion to Reconsider

"A motion to reconsider asks that a decision be reexamined in light of additional legal arguments, a change of law, or an argument that was overlooked earlier . . . ." *Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004). Where no final judgment has been rendered, the court considers a motion to reconsider under its "inherent power to modify or rescind interlocutory orders prior to final judgment." *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985) (quoting *Peterson v. Hanson*, 569 F. Supp. 694, 695 (W.D. Wis. 1983). Because Marathon argues that Dr. Olsen's "chain" of overlapping trade areas was not addressed in his expert report and thus was not included in its briefing on the motion to exclude, the court finds that a motion to reconsider is appropriate.

III. Discussion

In its motion to reconsider, Marathon argues that Dr. Olsen's opinion about the "chain" or "web" of overlapping trade areas was not included in his Rule 26 expert report and should thus be stricken. Plaintiffs respond that Dr. Olsen disclosed in his report the theory of overlapping trade areas, impliedly encompassing the "chain" of overlapping trade areas. Alternatively, Plaintiffs argue that Marathon learned of Dr. Olsen's "chain" theory during his deposition on June 13, 2007, but raised no objection to that testimony during the court's *Daubert* hearing. Thus, they argue, Marathon waived any objection to that theory.

Rule 26(a) of the Federal Rules of Civil Procedure provides that a witness retained to provide expert testimony must submit to the other parties an expert report which contains, *inter alia*, "a complete statement of all opinions the witness will express and the basis and reasons for them." FED. R. CIV. P. 26(a)(2)(B)(i). Federal Rule of Civil Procedure 37(c) provides possible sanctions for failing to disclose information under Rule 26:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

FED. R. CIV. P. 37(c)(1). The purpose of the expert discovery rules is "to aid the court in its fact-finding mission by allowing both sides to prepare their cases adequately and efficiently and to prevent the tactic of surprise from affecting the outcome of the case." *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000).

Applying these rules, the court must first address whether Dr. Olsen disclosed his "chain" theory of overlapping trade areas in his expert report in compliance with Rule 26. Plaintiffs argue that the "chain" theory was disclosed in Dr. Olsen's expert report. However, the portions of his report Plaintiffs cite mention only that Plaintiffs are competitors because they have

overlapping trade areas. His report does not disclose the "chain" theory as the basis for his opinion that Plaintiffs compete with each other based on overlapping trade areas. The court finds that Dr. Olsen's expert report does not comply with Rule 26 to the extent that Dr. Olsen concludes that Plaintiffs are competitors based on the "chain" or "web" theory of overlapping trade areas because that basis for his opinion was not in his expert report.

Because the court finds that the "chain" theory is not disclosed in Dr. Olsen's report, the court must next determine whether sanctions under Rule 37(c) are appropriate. "The sanction of exclusion is 'automatic and mandatory unless the party to be sanctioned can show that its violation of Rule 26(a) was either justified or harmless.'" *Nutrasweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 785–86 (7th Cir. 2000) (quoting *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996)).

Here, Plaintiffs assert that Marathon learned of the "chain" theory during Dr. Olsen's June 13, 2007, deposition but did not object to his testimony of the same at the *Daubert* hearing, thus waiving the objection. Marathon does not dispute that it learned of the "chain" theory during Dr. Olsen's June 13, 2007, deposition. Rather, citing the recent Seventh Circuit decision in *Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008), Marathon argues that Rule 26(a)(2) does not allow a party to cure deficiencies in an expert report by supplementing the report with later deposition testimony.

While Marathon is correct in asserting that a deposition may not supplement a report under Rule 26, Marathon fails to explain, adequately, why it did not object to Dr. Olsen's "chain" theory testimony in its motion to exclude or at the *Daubert* hearing. Instead of bringing this deficiency in Dr. Olsen's report to the attention of the court and timely objecting to it before the court ruled on whether to admit Dr. Olsen's opinion, Marathon waited until after the court

issued its ruling on the motion to exclude to file a motion to reconsider. In doing so, Marathon has necessitated a second round of briefing on the admissibility of Dr. Olsen's opinion, unduly delayed the resolution of this issue, and wasted judicial resources.

However, as discussed above, the Rule 37(c) sanction of excluding undisclosed information is mandatory, unless the failure to disclose is harmless. Marathon learned of this opinion on June 13, 2007, failed to include any objection to it in its motion to exclude Dr. Olsen's testimony filed July 2, 2007, failed to object to it again during the *Daubert* hearing on December 11–12, 2007 (wherein Dr. Olsen testified specifically about the "chain" theory), and waited to object for the first time until May 22, 2008, after the court ruled on the motion to exclude. The trial in this case is not scheduled until March 2009. In light of the fact that Marathon knew of Dr. Olsen's "chain" theory more than one year ago, had the chance to further cross-examine him about that theory at the *Daubert* hearing, delayed in objecting to that testimony, and the trial is more than eight months away, Dr. Olsen's failure to disclose in his expert report this additional basis for his opinion that Plaintiffs compete with each other is harmless at this point in the litigation. Therefore, exclusion of that testimony is not proper under Rule 37(c). *See Talbert v. City of Chicago*, 236 F.R.D. 415, 419 (N.D. Ill. 2006) ("There is a preference in the federal system that trials be determined on the merits and not on constructions of the Federal Rules of Civil Procedure that operate needlessly in a given case to deprive a party of its right to have a merits-based determination of a claim." (internal citations omitted)).

That said, the court finds proper a supplement to Dr. Olsen's expert report explaining his "chain" theory of overlapping trade areas.

IV. Conclusion

For the foregoing reasons, Marathon's motion to reconsider the admissibility of Dr. Olsen's opinion (Docket # 287) is **DENIED**. The court **ORDERS** Plaintiffs to file a supplemental report of Dr. Olsen to include the "chain" theory of overlapping trade areas within **30 DAYS** from the date of this Entry.

SO ORDERED this 3rd day of July 2008.

s/ ***Richard L. Young***
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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